In the

United States Court of Appeals

For the Ninth Circuit

In the Matter of the Application for a Writ of Habeas Corpus of JACK E. DUNCAN, *Appellant*,

v.

B. J. RHAY, Superintendent of the Washington State Penitentiary at Walla Walla, Washington, *Appellee*.

No. 15743

APPEAL FROM THE JUDGMENT OF THE DISTRICT COURT OF THE UNITED STATES FOR THE EASTERN DISTRICT OF WASHINGTON, SOUTHERN DIVISION

HONORABLE SAMUEL M. DRIVER, JUDGE

BRIEF OF APPELLEE

JOHN J. O'CONNELL,
Attorney General,

MICHAEL R. ALFIERI,
Assistant Attorney General,

FRANKLIN K. THORP,
Assistant Attorney General,

Attorneys for Appellee.

STATE PRINTING PLANT, OLYMPIA, WASH.

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Assistant Attorney General,

Attorneys for Appellee.

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APPELLEE'S STATEMENT OF THE CASE

This individual, together with Loren L. Hinton and Roy E. Mevis, was charged with the crime of grand larceny on April 20, 1949. The appellant and his co-defendant pleaded guilty to such charge and were each sentenced to confinement in the Washington State Penitentiary at Walla Walla for a period

not to exceed fifteen years. On April 20, 1949, and as early as March 7, 1949, appellant was represented by his counsel, Mr. Robert E. Cooper.

Thereafter, appellant twice petitioned the Washington Supreme Court for a writ of habeas corpus. In the first instance, his petition was remanded to the Superior Court for Pierce County where a hearing was held and the writ denied. The second petition was likewise denied, from which appellant appealed for Certiorari to the Supreme Court of the United States and was refused.

Substantially the same contention as was made in these petitions to the state court was presented to the United States District Court, *i.e.*, that appellant never pleaded guilty to the crime for which he was sentenced. On denying the petition, the District Court adopted as its own the findings of fact and conclusions of law made by the Superior Court for Pierce County. The appellant now specifies as error the following:

I.

The Superior Court for Pierce County had lost jurisdiction at the time it made its decision on appellant's petition.

II.

The petition to the District Court presented new matter proving erroneous the forementioned findings of fact and conclusions of law.

III.

The District Court did not dispose of the matter as law and justice require.

APPELLEE'S STATEMENT OF QUESTIONS INVOLVED

I.

Do the provisions of § 20 of Art. IV of the State Constitution and RCW 2.08.240 divest a superior court of jurisdiction to render a decision after expiration of ninety days?

II.

Assuming the petition to the District Court presented new issues, nevertheless, is such court precluded in any way in its determination of the matter from adopting the findings of fact and conclusions of law of the state court?

III.

Is a district court required by law and justice to do more than was done here?

ARGUMENT

I.

There is abundant authority that a decision rendered after ninety days is not void. *Brown v. Porter*, 7 Wash. 327, 34 Pac. 1105; *Ex rel. Washington Dredge & Imp. Co.*, 21 Wash. 629, 59 Pac. 505; *Demaris v. Barker*, 33 Wash. 200, 74 Pac. 362;

Harris v. Fidalgo Mill Co., 38 Wash. 169, 80 Pac. 289; *Moylan v. Moylan*, 49 Wash. 341, 95 Pac. 271.

In *Brown v. Porter*, *supra*, the question is discussed as follows, at page 330:

> "Lastly, it is contended that the judgment is void because it was not entered within the time limited by law. While some cases may be found to the contrary, the decided weight of the authorities is to the effect that judgments so entered are not void. See 12 Am. and Eng. Ency. Law, p. 71. * * * "

In *Demaris v. Barker*, *supra*, a similar argument based upon § 20 of Art. IV was proposed and answered as follows, at pages 202-203:

> "As another section of the constitution declares all of its provisions to be mandatory unless by express words they are declared to be otherwise, it is argued that this provision, being mandatory, can have no force or effect if it is not held that delay beyond the period fixed deprives the court of jurisdiction to render a decision.
>
> "It seems to us, however, that such a construction of the section would be directly subversive of its purpose. Manifestly, the purpose of the provision was to secure a speedy determination of causes submitted to the court for decision. * * *
>
> " * * * but certainly it was never thought that the remedy was to be found in the holding that the judgment afterwards rendered is nugatory. To give it this construction is to prolong the very evil it was sought to avoid, and to punish the very persons whom it was intended should be its beneficiaries. * * * "

II.

Where a petition for the writ of habeas corpus is disposed of merely upon consideration of the petition itself, as here, Rule 52 of the Federal Rules of Civil Procedure does not require findings of fact and conclusions of law to be entered. *Albert ex rel. Buice v. Patterson*, 155 F. (2d) 429. On the other hand, the court is in no way prevented from formulating or adopting findings and conclusions. Rather, it is a matter entirely within the court's discretion as was indicated in *Miller v. Tilley*, 178 F. (2d) 526, 528 as follows:

> "* * * After a case has been submitted and the trial judge has determined which party is entitled to prevail, it is for the judge to determine whether he will formulate the necessary findings himself, have counsel for the prevailing party prepare findings for the court, or settle the findings on notice. Whatever method a trial judge may follow, he assumes full responsibility for the findings made or adopted, which, when signed and filed by him, are the findings of the court."

Where the grounds relied on for habeas corpus have been fully considered by state courts, a federal district court may base its decision on the record there. *Bailey v. Smyth*, 220 F. (2d) 954. Thus, there is no obstacle to a federal district court's so adopting as its own the findings and conclusions of a state court.

The appellant has alleged that new issues were presented to the district court, reference being made

to the state court hearing. It is his claim that such hearing was unconstitutional, this assertion being based principally upon the court's supposed failure to allow his counsel adequate time to prepare. The claim is plainly without merit, due process not requiring the presence of counsel in habeas corpus proceedings. *Collins v. Heinze*, 217 F. (2d) 62.

III.

Finally, the appellant contends that the District Court did not dispose of the matter as law and justice require. It is argued that 28 U. S. C. § 2243 compels the writ to be issued in his case. However, when the relied upon portion of that section is read in its entire, the fallacy of his argument is apparent:

> "A court, justice or judge entertaining an application for a writ of habeas corpus shall forthwith award the writ or issue an order directing the respondent to show cause why the writ should not be granted, unless it appears from the application that the applicant or person detained is not entitled thereto. * * *"

In *Brown v. Allen*, 344 U. S. 443, 460-461, 73 S. Ct. 397, 97 L. Ed. 469, the Supreme Court of the United States considered this section as follows:

> "Jurisdiction over applications for federal habeas corpus is controlled by statute. The Code directs a court entertaining an application to award the writ. But an application is not 'entertained' by a mere filing. Liberal as the courts are and should be as to practice in setting out claimed violations of constitutional rights, the applicant must meet the statutory test of alleging facts that entitled him to relief.

> "The word 'entertain' presents difficulties. Its meaning may vary according to its surroundings. In § 2243 and § 2244 we think it means a federal district court's conclusion, after examination of the application with such accompanying papers as the court deems necesary, that a hearing on the merits legal or factual is proper. * * *"

Thus, where an application for the writ of habeas corpus is refused on the petition itself without more, *i.e.*, where it is not "entertained," there is clearly no mandate that the writ should issue.

Apart from the statute, appellant has also appeared to argue that the requirements of law and justice were not met simply by virtue of this summary denial without hearing of his petition in the district court. Again, *Brown v. Allen*, *supra*, disposes of this contention as follows, at page 465:

> "* * * As the state and federal courts have the same responsibilities to protect persons from violation of their constitutional rights, we conclude that a federal district court may decline, without a rehearing of the facts, to award a writ of habeas corpus to a state prisoner where the legality of such detention has been determined, on the facts presented, by the highest state court with jurisdiction, whether through affirmance of the judgment on appeal or denial of post-conviction remedies. * * *"

CONCLUSION

It is respectfully submitted that this appellant has not been denied any rights guaranteed by either the constitution or laws of the State of Washington or of the United States, either in the criminal proceedings or in the subsequent habeas corpus proceedings. We have no doubt that he pleaded guilty, on April 20, 1949, of the crime for which he is now incarcerated. No merit appearing to any of the appellant's allegations, it is respectfully submitted that the order of the District Court be affirmed.

Respectfully submitted,

JOHN J. O'CONNELL,
Attorney General,

MICHAEL R. ALFIERI,
Assistant Attorney General,

FRANKLIN K. THORP,
Assistant Attorney General,

Attorneys for Appellee.